

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7091

United States Court of Appeals

For the Second Circuit

WILLIAM TURNER, PTO Se.

Plaintiff-Appellant.

against

Hon. JAMES D. HOPKINS, Justice of the Appellate Div. of the State of N.Y.; Hon. LEONARD RUBENFELD, J.S.C. of the State of N.Y.; JAMES DEMPSEY, Esq.; Hon. ALVIN R. RUSKIN, J.S.C. of the State of N.Y.; Hon. HAROLD L. WOOD, J.S.C. of the State of N.Y.; N.Y. State Sen. BERNARD G. GORDON, Chairman, N.Y.S. Judiciary Comm.; Hon. MARTIN B. STECHER, J.S.C. of the State of N.Y.; Hon. WM. A. WALSH, JR., J.S.C. of the State of N.Y.; JERALD S. KALTER, M.D.; Hon. JOHN C. MARBACH, J.S.C. of the State of N.Y.; MILDRED TURNER; KRAFTCO CORP., and MFG. HANOVER TRUST CO. (Transfer Agents for Kraftco Corp.),

Defendants-Appellees.

**Appeal from a Judgment of the United States
District Court for the Southern District of New York**

BRIEF OF DEFENDANT-APPELLEE KRAFTCO CORPORATION

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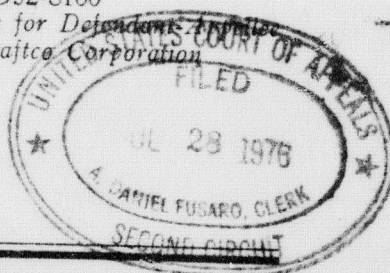


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United States Court of Appeals

For the Second Circuit

Docket No. 76-7091

WILLIAM TURNER, Pro Se, *Plaintiff-Appellant,*
against

Hon. JAMES D. HOPKINS, Justice of the Appellate Div. of the State of N.Y.; Hon. LEONARD RUBENFELD, J.S.C. of the State of N.Y.; JAMES DEMPSEY, Esq.; Hon. ALVIN R. RUSKIN, J.S.C. of the State of N.Y.; Hon. HAROLD L. WOOD, J.S.C. of the State of N.Y.; N.Y. State Sen. BERNARD G. GORDON, Chairman, N.Y.S. Judiciary Comm.; Hon. MARTIN B. STECHER, J.S.C. of the State of N.Y.; Hon. WM. A. WALSH, JR., J.S.C. of the State of N.Y.; JERALD S. KALTER, M.D.; Hon. JOHN C. MARBACH, J.S.C. of the State of N. Y.; MILDRED TURNER; KRAFTCO CORP., and MFG. HANOVER TRUST CO. (Transfer Agents for Kraftco Corp.),

Defendants-Appellees.

**Appeal from a Judgment of the United States
District Court for the Southern District of New York**

BRIEF OF DEFENDANT-APPELLEE KRAFTCO CORPORATION

Issue Presented for Review

The issue raised by this appeal is whether the District Court correctly dismissed the amended complaint, which seeks injunctive relief and damages resulting from an alleged deprivation of plaintiff's constitutional rights in connection with judgments entered against him in marital litigation in the New York State courts.

Statement of the Case

By this appeal plaintiff-appellant would have this Court overturn the decision of the District Court (Knapp, J.), dismissing the amended complaint on the ground that plaintiff has alleged no colorable claim under the Constitution of the United States (JA 160-164).¹ It is evident from the amended complaint and from plaintiff's brief on appeal that plaintiff has alleged no claim for relief with respect to defendant-appellee Krafteo Corporation ("Krafteo") cognizable under the Constitution in that plaintiff has failed to allege or show that Krafteo acted "under color of state law" or that Krafteo deprived plaintiff of a right, privilege, or immunity secured by the Constitution and the laws of the United States and that this is an impermissible attempt by plaintiff to relitigate issues which were unsuccessfully litigated by him in state court proceedings.

The Nature of the Case and the Proceedings Below

The amended complaint purports to allege violations of 42 U.S.C. §1983² for denial of equal justice under the

1. Throughout this brief, "JA" refers to the Joint Appendix and the Supplemental Joint Appendix.

References in the brief to matters contained in the record on appeal but not reproduced in the Joint Appendix are cited to "Record" or "Supplemental Record" together with the document number and where appropriate, the page number or exhibit number or letter thereof.

2. 42 U.S.C. §1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

law in various state court proceedings which involved the marital difficulties of plaintiff and his former wife, the defendant Mildred Turner.

Plaintiff commenced this action on July 28, 1975 (JA 168). On December 5, 1975, defendant Hon. John C. Marbach, Justice of the Supreme Court of the State of New York, moved to dismiss the complaint for failure to state a claim on the grounds of (1) judicial immunity; (2) *res judicata*; (3) 42 U.S.C. §1983 was not intended to permit collateral attack on state court judgment, and (4) the *Rooker* doctrine (JA 61-151).

Plaintiff cross-moved to amend the complaint and his motion was granted by Judge Knapp. After submission of an amended complaint to Judge Knapp, Judge Knapp on January 7, 1976 dismissed the complaint as amended for failure to state facts entitling plaintiff to any relief (JA 160-164). Judgment was entered on January 19, 1976 (JA 165). As of that date, plaintiff had not served the amended complaint on Kraftco.

On February 14, 1976, plaintiff filed a notice of appeal (JA 166-167). On March 5, 1976, the amended complaint was served on Kraftco.

On April 15, 1976, pursuant to Rule 60, Judge Knapp entered an Order of Clarification stating in part that the Memorandum and Order of 1/7/76 "intended the phrase 'all defendants' to encompass everyone named in the amended complaint, regardless of whether plaintiff served them with process before January 7, 1976, or any time thereafter" (Record, No. 18).

Statement of Facts

Although plaintiff has made numerous factual allegations encompassing a five year time period, the facts involving Kraftco are relatively simple. Among the various proceedings instituted by plaintiff in connection with his divorce from Mrs. Turner, plaintiff commenced an action in September, 1970 in the Supreme Court of Westchester County (JA 68-72). In that action plaintiff sought, *inter alia*, a declaratory judgment that he was the owner of certain stock in defendant Kraftco represented by stock certificates in his possession but registered in the name of Mrs. Turner (JA 71). After a trial in April, 1974 Justice Marbach found that Mrs. Turner was the owner of the stock and ordered that plaintiff turn over the stock certificates to Mrs. Turner, or in the event Mr. Turner failed to do so, that Kraftco cancel the stock certificates in question, issue new certificates in the name of Mrs. Turner and remit to Mrs. Turner the accrued dividends (JA 149-151).

Mr. Turner complied with the Court's order and turned over the certificates, although he placed a legend upon them stating they were the subject of litigation (JA 173). Mr. Turner's act of turning over the certificates obviated the need for Kraftco to issue new certificates pursuant to the Court's order.

Mr. Turner attempted an appeal to the Appellate Division, Second Department, which held that the appeal was not timely filed and therefore dismissed it (Record, No. 12, Exhibit 1, pgs. 14-16). Plaintiff's motion for reargument was denied (Record, No. 12, Exhibit 1, pgs. 12-13). The Court of Appeals affirmed the dismissal of the appeal on June 5, 1975 (Record, No. 12, Exhibit 2).

On July 28, 1975, plaintiff, who was then represented by counsel, told Kraftco that he intended to commence an action in the federal courts naming Kraftco (JA 25).

On July 31, 1975, pursuant to earlier requests by Mrs. Turner, the certificates containing the legend added by plaintiff were cancelled, new certificates were issued and accrued dividends were paid to Mrs. Turner (Record, No. 20, Exhibit 5 [Exhibit A thereto]).

Plaintiff commenced the instant action under the Civil Rights Act, 42 U.S.C. §1983 *et seq.*, alleging violations of his constitutional rights arising out of the trial in the Supreme Court in Westchester County. The basis for plaintiff's complaint was that his constitutional rights were violated in that he was compelled to go to trial without benefit, aid and assistance of counsel of plaintiff's choice (JA 169-175). He did not allege that Kraftco in any way was involved in this alleged denial of his constitutional rights and his sole claim against Kraftco was for injunctive relief, seeking to enjoin it from issuing "clean" certificates to Mrs. Turner (JA 169-175).

The amended complaint contains detailed factual allegations involving relationships among Mrs. Turner's attorney, various justices of the Supreme Court in Westchester County and Mr. Turner's former counsel. What is notably absent from the amended complaint and from plaintiff's brief is any factual allegation that Kraftco was involved with any of the above defendants or that Kraftco was in any way involved in the alleged denial of equal justice under the law.

The only reference to Kraftco in plaintiff's amended complaint is that the remittance of accrued dividends to Mrs. Turner on July 31, 1975, and the issuance of new certificates for the account of Mrs. Turner after notification that plaintiff was commencing new litigation involving the shares made a "contribution to my denial of constitutional rights in N.Y. State" (JA 24-25).

The only reference to Kraftco in plaintiff's brief is in the form of a question as to whether or not it is legally permissible for companies like Kraftco to surrender substantial assets after having been notified of the existence of ongoing litigation to determine the ownership of the subject assets. Even if a court should answer plaintiff's question in the negative, no constitutional claim has been made upon which plaintiff could recover damages from defendant Kraftco.

ARGUMENT

I

Plaintiff has failed to allege that defendant Kraftco acted under color of state law or authority and that Kraftco deprived plaintiff of a right, privilege or immunity secured by the Constitution.

To present a valid cause of action for violation of 42 U.S.C. §1983, a plaintiff must allege that defendant acted or claimed to act under color of state law and that the defendants have deprived the plaintiff of a right, privilege, or immunity secured by the Constitution and the laws of the United States. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Fine v. City of New York*, 529 F.2d 70, 73 (2d Cir., Dec. 31, 1975); *Sykes v. State of California*

(Dept. of Motor Vehicles), 497 F.2d 197, 200 (9th Cir. 1974); *Powell v. Jarvis*, 460 F.2d 551, 553 (2d Cir. 1972).

To satisfy the requirement that a private person such as Kraftco acted "under color of law" it is necessary for plaintiff to allege and prove (1) that the private person conspired with state officials and was a wilful participant in some joint action; or (2) that there was sufficient state action or compulsion with the private person with respect to the precise action alleged to be unconstitutional. *Adickes v. S.H. Kress & Co.*, *supra*; *Fine v. City of New York*, *supra*.

In the instant case plaintiff does not allege any conspiracy or any wilful participation by Kraftco in joint activity by defendant Mildred Turner, her attorney and the justices named as defendants to deprive plaintiff of his constitutional rights.

The remittance of dividends by Kraftco and the issuance of new certificates, the sole acts alleged against Kraftco, cannot constitute any violation of any constitutional right, privilege or immunity. Mere conclusory allegations that Kraftco "made a contribution" to the denial of plaintiff's constitutional rights is patently insufficient to state a claim. *Fine v. City of New York*, *supra*; *Hansen v. Ahlgrimm*, 520 F.2d 768, 770 (7th Cir. 1975). Plaintiff has wholly failed to specify any basis with respect to Kraftco upon which relief can be granted.

II

42 U.S.C. §1983 was not intended to permit relitigation of issues decided in state court proceedings.

In effect the plaintiff is seeking merely to relitigate an issue which has been fully litigated in the state courts—namely his ownership of certain stock of Kraftco. The ownership of the stock in question was litigated in a state court proceeding to which plaintiff and Kraftco were both parties. The doctrine of *res judicata* is applicable in the instant case to bar plaintiff from relitigating that issue or any issue which was or could have been raised by plaintiff. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940); *Taylor v. New York City Transit Authority*, 433 F.2d 665, 668 (2d Cir. 1970).

Courts have applied the doctrine of *res judicata* to §1983 claims arising out of state court proceedings even though the claim had not been passed upon by an appellate court because of a procedural defect. *Mertes v. Mertes*, 350 F. Supp. 472 (D. Del. 1972) (3 judge Court), aff'd 411 U.S. 961 (1973); *Katz v. State of Connecticut*, 433 F.2d 878 (2d Cir. 1970).

The Civil Rights Act was not intended to allow an unsuccessful litigant in a state court an opportunity to relitigate those issues and in effect to seek collateral review of state court proceedings. *Jemzura v. Belden*, 281 F. Supp. 200, 206 (N.D.N.Y. 1968); *Pierre v. Jordan*, 333 F.2d 951, 958 (9th Cir. 1964), cert. den. 379 U.S. 974 (1965).

This Court is without jurisdiction to review alleged errors in state court judgments even though plaintiff has raised such in the guise of a §1983 action. *Tang v. Appellate Division of New York Supreme Court, First Department*, 487 F.2d 138 (1973), *cert. den.* 416 U.S. 906 (1974).

In the instant case, plaintiff has impermissibly invoked the Civil Rights Act in effect to seek collateral review of his unsuccessful state court litigation.

Conclusion

For the foregoing reasons, defendant-appellee Kraftco submits that the decision of the District Court dismissing the amended complaint was correct and should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x
WILLIAM TURNER, :
Plaintiff, :
-against- : 75 Civ. 3673
KRAFTCO CORP., et al., :
Defendants. :
- - - - - x

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is an attorney associated with Sullivan & Cromwell, attorneys for Defendant Kraftco Corp.; that on the 28th day of July, 1976 he caused the within brief to be served upon the following persons at the following addresses by having two (2) true copies of the same to each, securely enclosed in a postpaid wrapper to be deposited in the Post Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said persons at said addresses as follows:

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George A. Schryer

Sworn to before me this
28th day of July, 1976

Bruce H. Arch
Notary Public

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Notary Public, State of New York
Residing in Queens County
Queens Co. Clk's No. 31-4609678
Certificate Filed in
New York Co. Clk's
Commission Expires March 30, 1977

